



**CITY OF LODI
COUNCIL COMMUNICATION**

AGENDA TITLE: Approve Waiver of Conflict of Interest for Kronick Moskovitz Tiedemann & Girard (KMT&G) to Represent Farmers & Merchants Bank (F&M Bank) in Connection with Letters of Credit Issued by F&M to the City of Lodi to Secure the Public Improvements constructed with the Plummer Dealership Subdivision

MEETING DATE: April 15, 2009

PREPARED BY City Attorney's Office

RECOMMENDED ACTION: Approve Waiver of Conflict of Interest for Kronick, Moskovitz, Tiedemann & Girard to Represent Farmers & Merchants Bank in Connection with Letters of Credit Issued by F&M to the City of Lodi to Secure the Public Improvements constructed with the Plummer Dealership Subdivision

BACKGROUND INFORMATION: The law firm of Kronick, Moskovitz, Tiedemann & Girard has represented the City of Lodi and F&M Bank for over the last five years. F&M Bank and the City have not in that time had divergent legal interests. As such the dual representation of the City of Lodi and F&M Bank have not presented an issue to date.

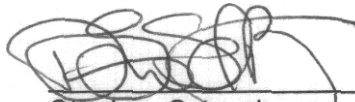
However, the recent failure of the Plummer Auto Group has resulted in a conflict from that dual representation. The Public Improvements required as a condition of the Subdivision of the Plummer site are secured by two letters of credit, one in the amount of \$156,700, securing payment to the labor and materials providers, and the other in the amount of \$313,400, securing the City's ability to complete the improvements in the event of a default.

That default has occurred. Staff is expecting a full value claim against the Labor and Materials Letter of Credit and a need for the City to call a smaller portion of the Faithful Performance Letter of Credit (approximately \$3,000 in costs and expenses and \$30,000 in Warranty Security that would be refunded if the project **does** not require warranty work for two years after project acceptance).

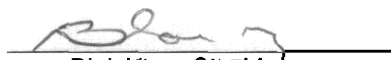
Mr. Bruce Scheidt of Kronick, Moskovitz, Tiedemann & Girard requests that the City waive a Conflict of Interest and allow him to advise F&M Bank in connection with the City's anticipated call on the above Letters of Credit. Mr. Scheidt proposes to isolate the KMT&G lawyers from any counsel representing the City. Moreover, the City will not need, and has never sought representation from KMT&G on matters that would expose them to confidential information that would be harmful to the City in calling the letters of credit.

Accordingly, I recommend that the Council authorize the City Manager to execute the attached Conflict Waiver.

FISCAL IMPACT: N/A


Stephen Schwabauer
City Attorney

APPROVED:


Blair King, City Manager

March 30, 2009

D. Stephen Schwabauer
City Attorney
City of Lodi
P.O. Box 3006
Lodi, CA 95241-1910

Re: Request for Consent to Representation of Farmers & Merchants Bank of Central California

Dear Mr. Schwabauer:

As you know I have represented the City of Lodi ("City") in employment and labor law matters over the years. Other attorneys in our law firm have provided legal services to the City of Lodi on municipal law and resource/environmental matters. Separately, other attorneys from my law firm and I have provided legal services to Farmers & Merchants Bank of Central California ("F&M Bank") on debt collection and loan-workout matters over the years. As you are aware, F&M Bank has asked me and my law firm to advise it in regard to two Irrevocable Standby Letters of Credit that were issued by F&M Bank to complete public improvements in accordance with the "Improvement Agreement for the Public Improvement of 1337 E. Kettleman Lane (APN 049-250-87)" ("Agreement").

The purpose of this letter is to seek the City's informed, written consent to the firm's representation in the matter discussed above. My law firm would provide advise and counsel to F&M Bank on the Irrevocable Standby Letters of Credit. We have presented a similar letter and request for informed, written consent to F&M Bank to permit this firm to continue to represent the City on matters unrelated to the Irrevocable Standby Letters of Credit.

To comply with the ethical standards applicable to lawyers, I am required to disclose several pertinent matters. As noted above, the firm's request from the City of Lodi to advise and counsel F&M Bank in regard to the Irrevocable Standby Letters of Credit while we also represent the City in unrelated matters creates a conflict of interest within the meaning of subdivision (C)(3) of Rule 3-310 of the California Rules of Professional Conduct ("Rules"). Please be advised that this firm will not represent F&M Bank in litigation that is adverse to the City of Lodi on any matter, including but not limited to the Irrevocable Standby Letters of Credit.

Rule 3-310(C)(3) requires the informed written consent of the City of Lodi under these circumstances. Without such consent, we cannot perform legal services on behalf of the F&M Bank in regard to the Irrevocable Standby Letters of Credit.

Should you wish to consent to our firm's giving advice and counsel to F&M Bank on the Irrevocable Standby Letters of Credit, we ask that you sign and return to us this letter where indicated below and acknowledge that the City will not seek to disqualify us from representing F&M Bank in other matters unrelated to the City.

We are obliged to protect the City's confidences (and those of F&M Bank as well) under the provisions of Section 6068, subdivision (e) of the Business and Professions Code. Provided F&M Bank and City consent to this representation, we will implement certain procedures to ensure that confidential information concerning the rights or liabilities of the F&M Bank or City are not exchanged within the firm or discussed without the City's and F&M Bank's consents as described below.

In this regard, the firm will set in place certain procedures to accomplish this confidentiality arrangement. These will include the formation of an "ethical wall" between the firm's lawyers who will be working on behalf of the F&M Bank and those who will be working on behalf of the City. The attorneys and paralegals affected by these procedures will be myself, Hayne Moyer, Candice Fields, Lynn McCaleb and Tyler Folck, who will work exclusively for F&M Bank on the matter described in this letter. All other lawyers of this firm will be able to work exclusively on behalf of the City, if necessary. To prevent any inadvertent disclosure or use of confidential information of either client, a "screen" or "ethical wall" will be established. The elements of the screen include the physical separation of attorneys, protections against inadvertent disclosure or use of confidential information, and procedures preventing access to confidential information and files.

With regard to each of the elements, we provide you with the following information:

1. None of the attorneys involved share an office. All of the attorneys have single occupancy, private offices with doors and interior space that can be secured.
2. Mr. Moyer, Ms. Fields, Mr. Folck, Lynn McCaleb and I will scrupulously refrain from any and all discussions about confidential information concerning the Irrevocable Standby Letters of Credit with any other attorneys in this law firm concerning the City of Lodi. Likewise, the other attorneys will scrupulously refrain from any discussions about their representation of the City of Lodi with Mr. Moyer, Ms. Fields, Mr. Folck, Lynn McCaleb and me until completion of this firm's work for F&M Bank concerning the Irrevocable Standby Letters of Credit. These matters will not be discussed at any firm meetings or gatherings at which any of these attorneys are present. All paralegals, secretaries and other staff will be informed of their obligation not to share information in regard to the screened matters.
3. Confidential F&M Bank and the City papers, information and files pertaining to this matter will not be circulated within the firm or be accessible to any KMTG personnel, except the respective attorneys involved in those matters.
4. Access to all relevant computer files is restricted. They cannot be retrieved by any inappropriate attorney or staff member.

If, after its consideration of the contents of this letter, the City of Lodi consents to the firm's representations under the circumstances outlined above, please memorialize the City's consent by executing the statement on the following page and returning it to me. We will be sending a similar letter to F&M Bank requesting F&M Bank's informed consent to this arrangement after disclosure of the issues raised in this letter. We will advise F&M Bank of the elements of the ethical wall or screen that we have erected as set forth above. Obviously, we will not proceed with the representation unless both the F&M Bank and the City's consent. If either F&M Bank or the City's elect not to consent, we will be unable to represent F&M Bank on the matter of the Irrevocable Standby Letters of Credit.

Please call me if these facts create an inconvenience for you. Also, if you have any questions or comments concerning this process or this correspondence, please feel free to contact me.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

Bruce A. Scheidt

CONSENT TO REPRESENTATION

On behalf of the City Lodi, I acknowledge that I have read, considered, and understood the contents of this letter. By signing this letter, I am acting within my authority to memorialize the City of Lodi's Project's consent to the representation by Kronick, Moskovitz, Tiedemann & Girard, a Professional Corporation, in the matter described herein.

Dated: _____

CITY OF LODI

By: _____

D. Stephen Schwabauer
City Attorney